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IN THE

Supreme Court of the United States

AK STEEL CORPORATION RETIREMENT ACCUMULATION PENSION PLAN AND AK STEEL CORPORATION BENEFIT PLANS ADMINISTRATIVE COMMITTEE

Petitioners,

v.

JOHN D. WEST, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF OF PETITIONER

This Court should grant review on two issues. First, as the Government acknowledges, the Sixth Circuit's interpretation of ERISA § 502(a)(1)(B) allows *state courts* to enforce ERISA provisions under their § 502(a)(1)(B) jurisdiction. Review of the Sixth Circuit's interpretation of § 502(a)(1)(B) should be granted in order to preserve exclusive *federal* jurisdiction over the enforcement of ERISA provisions and to resolve a split of authority among the lower courts.

Second, review should be granted on the *contra proferentem* issue because the Government acknowledges that the circuits are split on this recurring and important question regarding the interpretation of ERISA plans.

I. The Court Should Review The § 502(a)(1)(B) Issue.

A. The Lower Courts Are Split.

Although the text of § 502(a)(1)(B) refers expressly to actions that seek to enforce "the terms of [a] plan," the Sixth and Seventh Circuits have construed § 502(a)(1)(B) to allow actions that seek the enforcement of *either* plan terms *or* ERISA provisions. Pet. 16-17; U.S. Br. 16. By contrast, other circuits and state supreme courts have held that ERISA provisions cannot be enforced under § 502(a)(1)(B). The Government's efforts to explain away this conflict of authority are unconvincing.

The Government argues that *Ross* v. *Rail Car America Group Disability Income Plan*, 285 F.3d 735 (8th Cir. 2002), does not present a circuit split

because the plaintiff there did not seek "monetary relief representing additional plan benefits." U.S. Br. 17. But Ross *did* seek monetary relief consisting of the "full benefits" that he was allegedly due under his plan. 285 F.3d at 740-41. He argued that he was entitled to additional benefits under the original terms of his plan and that two plan amendments that purported to reduce his benefits violated ERISA. *See id.*

The Eighth Circuit held that Ross could not proceed under § 502(a)(1)(B) because he was not seeking benefits due "under the terms of the plan," but instead sought to "enforce a provision of [ERISA]." *Id.* The Sixth Circuit's holding that a plan participant can enforce ERISA provisions under § 502(a)(1)(B) squarely conflicts with the Eighth Circuit's holding that § 502(a)(1)(B) "does not authorize such a claim." 285 F.3d at 740. *See* Pet. 15-16; Reply Br. 4-5.

The Sixth Circuit's decision also conflicts with *Carrabba* v. *Randalls Food Markets, Inc.*, 252 F.3d 721 (5th Cir. 2001). The Government argues that *Carrabba* "is not the type of decision that gives rise to a circuit conflict" because it merely affirms a district court opinion. U.S. Br. 17. But the Fifth Circuit's published opinion adopts the district court opinion as Fifth Circuit law, finding "no reversible error of fact or law by the district court," and affirming "based on that court's conscientious, well-reasoned opinions, which will be published." 252 F.3d 721. Such published affirmances have

"precedential value." *See* 5th Cir. R. 47.5.3.[1] Moreover, in prior filings with this Court, the Solicitor General has recognized that such published affirmances create a valid circuit split. *See, e.g.*, Reply Br., *United States* v. *Robinson*, No. 03-547, at *4-*5 (Dec. 18, 2003) (arguing that the Sixth Circuit's opinion in *Venture Funding, Ltd.* v. *Commissioner*, 110 T.C. 236, 240 (1998), *aff'd*, 198 F.3d 248 (6th Cir. 1999) (Table), established a cert-worthy circuit split because the decision had precedential value under Sixth Circuit rules).

The district court opinion adopted by the Fifth Circuit in *Carrabba* holds that plan participants who seek additional benefits under the provisions of ERISA cannot proceed "under the authority of [§ 502(a)(1)(B)]," but instead must proceed under § 502(a)(3). *Carrabba* v. *Randalls Food Mkts., Inc.*, 145 F. Supp. 2d 763, 770 (N.D. Tex. 2000). That holding directly conflicts with the Sixth Circuit's decision that ERISA provisions *can* be enforced under § 502(a)(1)(B).

The Government also errs in suggesting that *Ross* and *Carrabba* can be distinguished as cases that merely involved a request for "reformation of the plan." U.S. Br. 17, 18. The *plaintiffs* in those cases came to court asking not for a reformation of the plan, but for additional benefits allegedly due under ERISA provisions. *See Ross*, 285 F.3d at 740-41; *Carrabba*, 145 F. Supp. 2d at 770. The *courts* in those cases responded that no such relief was

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[1] Decisions without precedential value are affirmed in unpublished orders. *See* 5th Cir. R. 47.6.

available under § 502(a)(1)(B), but that the plaintiffs could seek a reformation of the plan under § 502(a)(3) to conform the plan to ERISA.

Similarly, in *Duffy* v. *Brannen*, the Vermont Supreme Court held that a claim for benefits "'under the terms of the plan'" falls within a state court's concurrent jurisdiction under § 502(a)(1)(B), while a claim that "calls for a construction and implementation of standards of conduct established by ERISA" does not. 529 A.2d 643 (Vt. 1987). And, in *Richland Hospital, Inc.* v. *Ralyon*, the Ohio Supreme Court held that while it had jurisdiction over a claim for benefits due under the contractual terms of the plan, "Subsection [502](a)(1)(B) expressly limits the actions cognizable in state courts and only provides for the enforcement of contractual rights as remedies." 516 N.E.2d 1236, 1239-40 (Ohio 1987).

Finally, *Oddino* v. *Oddino* declares that "ERISA title I, sections 1001 through 1145," cannot be enforced under § 502(a)(1)(B). 939 P.2d 1266, 1273 (Cal. 1997). Here, in sharp contrast, the courts below enforced ERISA provisions codified at 29 U.S.C. §§ 1053(e)(2), 1054(c)(3) and 1055(g)(3) under ERISA § 502(a)(1)(B). *See* U.S. Br. 6, 7. The Sixth Circuit decision thus conflicts with all three of these state supreme court decisions.

B. The Sixth Circuit Incorrectly Construed § 502(a)(1)(B).

1. The Government argues that "ERISA plans incorporate the provisions of ERISA" by operation of law. U.S. Br. 12; *see also id.* at 1314 ("the requirements of ERISA are ... incorporated into

ERISA plans."). In the Government's view, this means that ERISA provisions can be treated as implied-in-law plan terms that may be enforced under § 502(a)(1)(B). *Id.* at 10-14. This argument fails for three reasons.

First, it contradicts the statutory text. Section 502(a)(1)(B) authorizes only those actions in which a participant seeks to recover "benefits due to him *under the terms of his plan*." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). By contrast, ERISA § 502(a)(3) authorizes actions that seek the enforcement of *either* "any provision of this title *or* the terms of the plan." 29 U.S.C. § 1132(a)(3) (emphasis added).

Under the Government's reading of § 502(a)(1)(B), that provision has exactly the same meaning that it would have if it authorized a plan participant to recover "benefits due to him under *any provision of this title or* the terms of his plan." But despite referring to "any provision of this title" in § 502(a)(3), Congress omitted that language from § 502(a)(1)(B). Especially in a reticulated statute such as ERISA, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Second, the Government ignores the fact that Congress deliberately excluded actions to enforce ERISA provisions from the scope of § 502(a)(1)(B) in order to maintain exclusive federal jurisdiction over those provisions. With two exceptions, ERISA

§ 502(e) grants federal courts "exclusive jurisdiction" over ERISA actions. 29 U.S.C. § 1132(e). The two exceptions are that state courts have concurrent jurisdiction over suits brought under § 502(a)(1)(B) and suits brought by state governments to enforce qualified medical child support orders. *See id.* As Congress explained in the Conference Report on ERISA, this allocation of jurisdiction was intended to permit state courts to hear suits that solely involve the contractual terms of a plan document, but to prevent them from hearing suits that "involve application of the title I provisions," *i.e.*, the provisions of ERISA. H.R. Conf. Rep. No. 93-1280, reprinted in 1974 U.S.C.C.A.N 5038, 5107. By contrast, federal courts were given exclusive jurisdiction over "actions to enforce or clarify *benefit rights provided under title I.*" *Id.* (emphasis added).[2]

The Government's interpretation of § 502(a)(1)(B) thwarts Congress's intended allocation of jurisdiction by allowing state courts to enforce ERISA provisions under their § 502(a)(1)(B) jurisdiction. It also turns the exclusive federal jurisdiction provision in § 502(e) into a hollow shell. ERISA's most important provisions – its fiduciary, vesting, accrual, anti-cutback, and forfeiture provisions – all affect the size of a participant's

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[2] The Government notes that a sentence in the Conference Report states that suits seeking the enforcement of plan terms "aris[e] under the laws of the United States in a similar fashion to those brought under section 301 of the [LMRA]." U.S. Br. 15 n.4. That sentence merely means that *federal* courts have federal question jurisdiction to hear suits that seek the enforcement of plan terms, not that *state* courts can hear suits to enforce ERISA provisions.

benefit.[3] Under the Government's reading of § 502(a)(1)(B), state courts may enforce all of these core ERISA provisions on the theory that the provisions constitute implied-in-law plan terms.

Third, the Government confuses the fact that plan terms are *subordinate* to the provisions of ERISA with the very different proposition that the terms of the plan *include* ERISA provisions for purposes of § 502(a)(1)(B). For example, the Government quotes language from *Central Laborers' Pension Fund* v. *Heinz*, 541 U.S. 739, 750 (2004), to the effect that ERISA's anti-cutback rule overrides contrary plan terms and effectively "adds a mandatory term to all retirement packages." U.S. Br. 11. But a rhetorical statement that an ERISA provision effectively adds a mandatory term to a retirement package is a far cry from literally reading an ERISA provision into "the terms of the plan" within the meaning of § 502(a)(1)(B) – a provision that was deliberately written to exclude ERISA provisions from its scope. No decision of this Court holds or implies that ERISA provisions may be enforced under § 502(a)(1)(B). *See* Reply Br. 7-8.[4]

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[3] For example, any fiduciary breach that reduces the size of the plan's assets will reduce the benefits of participants in defined contribution plans, since in those plans a participant's benefit consists of an allocated share of the plan's total assets. *See* 29 U.S.C. § 1002(34).

[4] The Government also argues that *Unum Life Ins. Co.* v. *Ward*, 526 U.S. 358 (1999), shows that state insurance regulations, which are saved from ERISA preemption by the savings clause for state regulation of insurance, may be read into terms of ERISA insurance plans. U.S. Br. 11. Even if that is correct, (...continued)

The Government also notes that ERISA § 404(a)(1)(D) requires plan administrators to follow the provisions of ERISA if those provisions conflict with the terms of the plan. U.S. Br. 10-11. In the Government's view, if a *plan administrator* is required to enforce the provisions of ERISA, a *court* must have the power to do so as well. U.S. Br. 16. This argument attacks a straw-man. As shown below, the question here is not *whether* courts can enforce ERISA provisions, but *which* courts may do so – state courts or federal courts – and under *which* ERISA cause of action provision.

2. In an amicus brief submitted in *Oddino* v. *Oddino*, *supra*, the Government advocated Petitioners' interpretation of § 502(a)(1)(B), arguing that where a plaintiff seeks "to enforce a provision of ERISA," ERISA "vests exclusive jurisdiction in the federal district courts." 1997 WL 33559420, *21 (U.S. Br. Jan. 16, 1997) (header); *see also id.* at *22-23 (arguing that in an "action to enforce a provision of ERISA, jurisdiction ... is exclusively in federal court."). The Government apparently has changed its position based on a mistaken concern that a textual interpretation of § 502(a)(1)(B) would "substantially restrict relief in cases involving plan terms that ERISA renders illegal." U.S. Br. 16.

Contrary to the Government's assertion, relief is available in cases in which plan terms violate ERISA, but it is available exclusively in federal court under § 502(a)(3). Specifically, a participant may sue

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there is nothing troubling about the prospect of state courts enforcing state insurance regulations against insurance plans.

under § 502(a)(3) for the equitable relief of reformation of the plan to conform the plan to the provisions of ERISA. *See* Pet. 18 n.7. Indeed, the Government appears to acknowledge that the *Ross* and *Carrabba* decisions discussed above both identify reformation of the plan under § 502(a)(3) as the proper means for seeking relief in this situation. *See* U.S. Br. 17-18. Moreover, the Government itself recently argued to this Court in *Amschwand* v. *Spherion*, No. 07-841, that § 502(a)(3) allows "'monetary relief ... against fiduciaries who breach their ERISA duties.'" Pet. Supp. Br. of May 30, 2008 at 3 (quoting U.S. Br. in *Amschwand*).

Here, Respondents cannot obtain relief under § 502(a)(3) because a reformation of the Plan is barred by another ERISA provision, *see* 26 U.S.C. § 436(c), and because the Sixth Circuit found that Respondents waived any such relief in the District Court, *see* Pet. 9. But relief ordinarily will be available to a participant harmed by plan terms that violate ERISA.

3. The Government commits a fundamental error when it asserts that Respondents' claim to the additional benefits they seek "arises under Section 1.2 of the Plan." U.S. Br. 13. The terms of the Plan expressly provide that lump sum payments to participants shall be "equal" to a participant's account balance. Pet. App. 90a (§§ 4.1, 4.2). Respondents argue that ERISA overrides these plan terms and requires a whipsaw calculation that results in lump sum payments *greater* than their account balances. *See* Reply Br. 1-4. Neither Plan Section 1.2 nor any other Plan term promises a lump sum payment greater than an account balance.

Indeed, Section 1.2 does not address the calculation of lump sum payments *at all*. Instead it describes the calculation of a "single life annuity" beginning at age 65. Pet. App. 76a. The Government's bald assertion that "Section 1.2 of the Plan entitled [Respondents] to lump-sum distributions that were actuarially equivalent to the amounts in their hypothetical plan accounts," U.S. Br. 13, is therefore nonsensical. Section 1.2 describes an entitlement to a single life annuity, not an entitlement to a lump sum payment. Pet. App. 76a.

Respondents cannot look to Plan Section 1.2 for any help in determining the size of their lump sum payments. Instead, as the Sixth Circuit recognized, Respondents' claim depends on the twin propositions that "the Plan's terms ... did not comply with the law," Pet. App. 26a, and that ERISA's requirements may be enforced under § 502(a)(1)(B), *see* Reply Br. 2. Even the Government concedes that "the decision below is ultimately based on the [Sixth Circuit's] conclusion that petitioner's interpretation of the Plan would violate ERISA." U.S. Br. 20. Accordingly, this case squarely presents the question of whether ERISA provisions may be enforced under § 502(a)(1)(B).

C. The Issue Is Exceptionally Important.

As the Government concedes (U.S. Br. 14-15), the Sixth Circuit's interpretation of § 502(a)(1)(B) allows state courts to enforce ERISA provisions – something that until now state courts have correctly declined to do. This creates the troubling prospect that fifty different state court systems will adopt inconsistent interpretations of ERISA's complex

provisions. Congress rightly worried that this would pose a serious threat to uniformity and predictability in the regulation of ERISA plans and would discourage employers from offering such plans. *See* Pet. 19-21. Review should be granted to assure that the enforcement of ERISA remains – as Congress expressly provided – an exclusively federal responsibility.

II. The Court Should Review The *Contra Proferentem* Issue.

The Sixth Circuit applied the canon of *contra proferentem* to reject the Plan Administrator's interpretation of the Plan. *See* Pet. 22-26. The Government acknowledges that the Sixth Circuit applied *contra proferentem* here, agrees that the circuits are split on whether *contra proferentem* may override a plan administrator's interpretation of a plan, and does not deny that this is a recurring and important issue in the interpretation of ERISA plans. *See* U.S. Br. 19-20. The Government's argument that this is not a good case for resolving the circuit split is unpersuasive.

The Government asserts that *contra proferentem* did not change the outcome in this case because (i) the Sixth Circuit ultimately held that the Plan violates ERISA, and (ii) the courts of appeals agree that ERISA requires a whipsaw calculation. *See* U.S. Br. 20, 21. Both of these arguments overlook the fact that adoption of the Plan Administrator's interpretation of the Plan would have avoided any conflict between the Plan and ERISA's requirements.

Under the Plan Administrator's interpretation of the Plan, the Plan qualifies for special treatment under the applicable ERISA provisions, and as a result the whipsaw calculation merely requires lump sum payments equal to a participant's account balance – just as the Plan provides. *See* Pet. 11-12 & n.4; Reply Br. 9-10; CA App. Br. 46-48. Neither the Sixth Circuit nor any other court has rejected this interpretation of ERISA. Instead, the Sixth Circuit applied *contra proferentem* to reject the interpretation of the Plan that would have allowed the Plan to qualify for this treatment. *See id. Contra proferentem* thus changed the outcome of this case.

The Government also asserts that "[t]he parties did not brief the issue in the court of appeals," U.S. Br. 20-21, but Petitioner expressly argued in the court of appeals that the Plan Administrator's interpretation of the Plan avoided any conflict between the Plan and ERISA. C.A. App. Br. 46-48. Petitioner further agued that this interpretation "is reviewed under the deferential 'arbitrary and capricious' standard and should be upheld so long as it is susceptible of 'reasoned explanation.'" *Id.* at 49; *see also* C.A. Reply Br. 18. The Sixth Circuit applied *contra proferentem* to reject the Plan Administrator's interpretation and the argument made in Petitioners' briefs. In any event, since it is undisputed that the Sixth Circuit applied *contra proferentem* to override the Plan Administrator's interpretation of the Plan, this case is a good vehicle for resolving the *contra proferentem* circuit split.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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